

No. 75263-0

BRIDGE, J. (concurring)—I agree with the resolution of this case and with the analysis of the law as set forth in the majority opinion. I concur separately because I want to take this opportunity to acknowledge the often unrepresented third party in any custody dispute, the child. In my mind, decisions about a child's welfare should be premised to a greater degree than our current precedent allows on the concept that a child has a fundamental right to a stable and healthy family life. That right should include independently valued protections of a *child's* relationship with siblings and with adults other than his or her biological parents with whom the child has formed a critical bond. *See, e.g., In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005); *In re Celine R.*, 31 Cal. 4th 45, 1 Cal. Rptr. 3d 432, 71 P.3d 787 (2003) (discussing the importance of stable sibling relationships).

Consideration of rights *the child* holds is of paramount importance because, regardless of the family constellation from which the child comes, in any placement dispute it is *the child* who is the most vulnerable and the most voiceless. Indeed, many practitioners and scholars have long advocated for a more child-centered focus in the resolution of disputes in our family courts. Melinda A. Roberts, *Parent*

*and Child In Conflict: Between Liberty and Responsibility*, 10 Notre Dame J. L. Ethics & Pub. Pol’y 485, 485-505 (1996); Annie G. Steinberg, Barbara Bennett Woodhouse & Alyssa Burrell Cowah, *Child-Centered, Vertically Structured, and Interdisciplinary: An Integrative Approach to Children’s Policy, Practice, and Research*, 40 Fam. Ct. Rev. 116, 121 (2002). This court has recognized as much in the context of paternity disputes. “It would be ironic to find issues of parent-child ties are of constitutional dimension when the parents’ rights are involved but not when the child’s are at stake.” *State v. Santos*, 104 Wn.2d 142, 143-44, 702 P.2d 1179 (1985). I see no reason why this concern for the constitutional right of the child should be implicated in a paternity proceeding, and not in other proceedings affecting the placement and care of a child.<sup>1</sup>

*Santos* instructs that, “The importance of familial bonds accords constitutional protection to the parties involved in judicial determinations of the parent-child relationship.” 104 Wn.2d at 146. The notion of these “parties” invariably includes the children at issue. *Id.* “Familial bonds” are not just about biology; “biological relationships are not exclusive determination of the existence of a family.” *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816,

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<sup>1</sup> For example, in keeping with its goals of permanency and stability for the child, California has a statutory scheme that allows courts to take into account familial attachments, such as sibling relationships, when making placement decisions. *See, e.g.*, Cal. Welf. & Inst. Code § 16002 (West 2001); Cal. Welf. & Inst. Code § 366.26 (West Supp. 2006); *In re Celine R.*, 31 Cal. 4th 45; *In re Luke M.*, 107 Cal. App. 4th 1412, 1422-24, 132 Cal. Rptr. 2d 907 (2003). I regret that Washington does not have similar statutory provisions.

843, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).

[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in “promot[ing] a way of life” through the instruction of children as well as from the fact of blood relationship.

*Id.* at 844 (citation omitted); *In re Parentage of L.B.*, 155 Wn.2d 679 (recognizing de facto parent status for nonbiological parents). Once we recognize that the child’s interest in his or her familial bonds is constitutionally protected, *Santos*, 104 Wn.2d at 146, and that familial bonds stem not just from biology, but also from the intimacies of daily association, then it logically follows that a child has a constitutionally protected interest in whatever relationships comprise his or her family unit. It would be prudent, then, for courts and the legislature to begin to acknowledge the harm that may be visited upon a child when his or her fundamental right to a stable family unit is compromised by the fundamental rights of the biological parent.

Courts tasked with the difficult duty of resolving the question of a child’s welfare may have to reconcile potentially competing interests held by a biological parent and child. But is not, at least in part, a biological parent’s right to control the outcome of his or her child’s life dependent upon the responsibility he or she has exercised on behalf of that child throughout the child’s life, and the interest he or she has taken in the child’s rearing?<sup>2</sup> “[T]he mere existence of a biological link

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<sup>2</sup> As long as the burden of showing a truncated parent-child relationship rests with the nonparent, I do not find consideration of the extent to which a biological parent

does not merit [full] constitutional protection [for a biological parent].” *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).

The significance of the biological connection is that it offers the natural [parent] an opportunity that no other . . . possesses to develop a relationship with [the child]. If [the parent] grasps that opportunity and accepts some measure of responsibility for the child’s future, he [or she] may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If [the parent] fails to do so, the Federal Constitution will not automatically compel a State to listen to his [or her] opinion of where the child’s best interests lie.

*Id.* at 262 (footnote omitted); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978) (suggesting a stable environment may trump parental rights in certain instances, particularly where the complaining parent has not played a pivotal role in the child’s life). Where a biological parent has failed to fulfill his or her responsibilities to a child, such that the child has formed a stable and healthy family unit outside the boundaries of a blood relationship, it may be that a child’s interests and rights are not preserved or respected by placement with that parent.

I recognize that the present case does not give this court the opportunity to fully flesh out what rights a child may hold in circumstances like those presented here. But I hope that if and when the time comes to define what role the child must play in a decision about his or her life, the contours of that role will be informed by

exercises his or her parental duties and obligations to conflict with the ruling in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). There the Court specifically stated that its decision did not “define . . . the precise scope of the parental due process right in the visitation context.” *Id.* at 73. And, obviously, that case concerned a visitation request, one that was challenged by the *custodial* parent. *Id.* at 60-61. Therefore, as the custodial parent, the parent in *Troxel* clearly exercised responsibility and care over her children, which afforded her constitutional rights that may have properly overwhelmed that of her children.

the recognition of some degree of constitutional protection the child holds to stable and healthy family relationships. Moreover, I would hope that in the future our state's courts and our family and child welfare laws move more cohesively toward a recognition of the child's independent rights in questions concerning his or her living arrangement and associations. Such considerations should be manifestly proper in a proceeding where it is ultimately *the child* who has the most at stake. *See Santos*, 104 Wn.2d at 143.

AUTHOR:

Justice Bobbe J. Bridge

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WE CONCUR:

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